Supreme Court, U.S.
FILED
MAY 15 1991
OFFICE OF THE CLERK

No. 90-1572

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ALABAMA POWER COMPANY,

Petitioner,

v.

GERALD L. TURNER, Administrator of the Estate of KENNETH ALLEN TURNER, Deceased,

Respondent.

REPLY MEMORANDUM

Of Counsel:

STERLING G. CULPEPPER, JR.
M. ROLAND NACHMAN, JR.
DAVID R. BOYD
WILLIAM P. COBB, II
BALCH & BINGHAM
Post Office Box 78
Montgomery, Alabama 36101
(205) 834-6500

JOSEPH AVANZATO
JEFFREY T. GILLERAN
GIBSON, DUNN & CRUTCHER
1050 Connecticut Ave., N.W.
Washington, D.C. 20036-5303

THEODORE B. OLSON
*LARRY L. SIMMS
GIBSON, DUNN & CRUTCHER
1050 Connecticut Ave., N.W.
Washington, D.C. 20036-5303
(202) 955-8500

Attorneys for Petitioner

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY MEMORANDUM	1
CONCLUSION	9

TABLE OF AUTHORITIES

Cases	Page
Alabama Power Co. v. *Cantrell*, 507 So. 2d 1295 (Ala. 1987), *appeal dismissed*, 486 U.S. 1028 (1988)	7
Alabama Power Co. v. *Capps*, 519 So. 2d 1328 (Ala.), *appeal dismissed*, 486 U.S. 1002 (1988)	7
Atlantic & Gulf Stevedores, Inc. v. *Elderman Lines, Ltd.*, 369 U.S. 355 (1962)	8
Bankers Life & Casualty Co. v. *Crenshaw*, 486 U.S. 71 (1988)	7
Black Belt Wood Co. v. *Sessions*, 514 So. 2d 1249 (Ala. 1987)	6
Bonsignore v. *City of New York*, 521 F. Supp. 394 (S.D.N.Y. 1981), *aff'd*, 683 F.2d 635 (2d Cir. 1982)	2
Brown v. *Maxey*, 124 Wis. 2d 426, 369 N.W.2d 677 (1985)	2
Bud Wolf Chevrolet, Inc. v. *Robertson*, 508 N.E.2d 567 (Ind. Ct. App. 1987), *vacated in part*, 519 N.E.2d 135 (Ind. 1988)	2
Burlington Northern R. Co. v. *Whitt*, No. CV-85-311 (Ala. Dec. 21, 1988), *cert. denied*, 59 U.S.L.W. 3665, 3672 (U.S. Apr. 1, 1991) (No. 90-1250)	7
Clardy v. *Sanders*, 551 So. 2d 1057 (Ala.), *cert. denied*, 110 S. Ct. 376 (1989)	7
County of Riverside v. *McLaughlin*, No. 89-1817 (U.S. May 13, 1991)	8
Eichenseer v. *Reserve Life Insurance Co.*, 682 F. Supp. 1355 (N.D. Miss. 1988), *aff'd*, 881 F.2d 1355 (5th Cir. 1989), *g.v.r.*, 59 U.S.L.W. 3625, 3628 (U.S. Mar. 18, 1991) (No. 89-1303)	2
First Interstate Development Corp. v. *Ablanedo*, 511 So. 2d 536 (Fla. 1987)	2

Table of Authorities Continued

	Page
Intercontinental Life Insurance Co. v. *Lindblom*, *g.v.r.*, 59 U.S.L.W. 3693, 3701 (U.S. Apr. 15, 1991) (No. 90-1284)	3
Louis Pizitz Dry Goods Co. v. *Yeldell*, 274 U.S. 112 (1927)	6,7
Pacific Mutual Life Insurance Co. v. *Haslip*, No. 89-1279 (U.S. Mar. 4, 1991)	*passim*
Sliman v. *Aluminum Co. of America*, 112 Idaho 277, 731 P.2d 1267 (1986), *cert. denied*, 486 U.S. 1031 (1988)	2
Southern Life & Health Insurance Co. v. *Turner*, *g.v.r.*, 59 U.S.L.W. 3733, 3741 (U.S. Apr. 29, 1991) (No. 90-1399)	3
United States v. *Halper*, 490 U.S. 435 (1989)	5,6
Federal Constitutional Provision	
U.S. Const. amend. XIV	*passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1572

ALABAMA POWER COMPANY,

Petitioner,

v.

GERALD L. TURNER, Administrator of the Estate of KENNETH ALLEN TURNER, Deceased,

Respondent.

REPLY MEMORANDUM

In the Petition, Alabama Power Company ("Alabama Power") establishes that punitive damage awards for negligent, non-intentional, non-malicious conduct violate the Due Process Clause of the Fourteenth Amendment because (1) they are inconsistent with centuries of Anglo-American jurisprudence as validated by numerous opinions of this Court, and (2) they violate principles of fundamental fairness embodied in that Clause. Respondent's sole response on the merits is to assert that, "[i]t simply does not matter whether [Alabama Power's] conduct is characterized as negligent, grossly negligent, wanton or willful." Opp., at 24. Our legal heritage, however, demonstrates that such distinctions are constitutionally significant and that the departure of Alabama and other jurisdictions from these legal roots is con-

stitutionally unacceptable. Unless this Court disavows the historical analysis in *Pacific Mutual* before the ink on that opinion is dry, the historical analysis offered in the Petition must control the disposition of the first question presented by Alabama Power.[1]

Even if punitive damages for negligent, non-malicious conduct are constitutionally acceptable,[2] the

---

[1] As demonstrated in the Petition, at 6-7 & n.5, Alabama is not the only jurisdiction that awards punitive damages for negligent, non-malicious conduct. Respondent contends that the cases cited by Alabama Power involved intentional, malicious conduct. Opp., at 18 n.23. This assertion is demonstrably erroneous. For example, in *Eichenseer* v. *Reserve Life Insurance Co.*, 682 F. Supp. 1355, 1373 (N.D. Miss. 1988), *aff'd*, 881 F.2d 1355 (5th Cir. 1989), *g.v.r.*, 59 U.S.L.W. 3625, 3628 (U.S. Mar. 18, 1991) (No. 89-1303), the district court expressly held that a "finding of malice on Reserve Life's part is not supported by the record." The district court in *Bonsignore* v. *City of New York*, 521 F. Supp. 394 (S.D.N.Y. 1981), *aff'd*, 683 F.2d 635 (2d Cir. 1982), stated that the jury found that the defendant had been negligent, but the court nonetheless affirmed the award of punitive damages. In *Brown* v. *Maxey*, 124 Wis. 2d 426, 369 N.W.2d 677 (1985), the district court noted that the jury verdict forms asked only whether the defendant had been negligent and proceeded to affirm the punitive damage award. *See also First Interstate Development Corp.* v. *Ablanedo*, 511 So. 2d 536 (Fla. 1987) (Overton, J., dissenting) (defendant's tort lacked "additional circumstance of aggravation" to justify punitive damages); *Sliman* v. *Aluminum Co. of America*, 112 Idaho 277, 731 P.2d 1267 (1986) (McFadden, J., dissenting) (criticizing majority for awarding punitive damages for mere negligence), *cert. denied*, 486 U.S. 1031 (1988); *Bud Wolf Chevrolet, Inc.* v. *Robertson*, 508 N.E.2d 567 (Ind. Ct. App. 1987) (Buchanan, J., concurring in part and dissenting in part) (the majority position allows punitive damage awards for mere negligence), *vacated in part*, 519 N.E.2d 135 (Ind. 1988) (upheld punitive damage award).

[2] To support his argument that Alabama's punitive damage

Petition presents the further question of what procedural limitations, in addition to those that, under *Pacific Mutual*, apply to cases in which punitive damages are imposed for intentional, malicious conduct, should be adopted to restrict the discretion of juries and courts to impose punitive damages for simple negligence. Respondent's cursory answer to this question is that no procedural requirements are necessary to restrain juries and courts because "Alabama refuses to allow any attempt to place a monetary value on human life." Opp., at 13.[3] This state policy, how-

---

system is constitutional even as applied to negligent, non-malicious conduct, respondent notes that subsequently to the decision in *Pacific Mutual*, this Court denied certiorari in three Alabama cases challenging the constitutionality of punitive damage awards in Alabama. Opp., at 22. None of those cases, however, involved the imposition of punitive damages for negligent, non-malicious conduct. Furthermore, respondent conveniently overlooks the fact that this Court subsequently granted certiorari in two other Alabama punitive damage cases, which it vacated and remanded for reconsideration in light of *Pacific Mutual*. *See Southern Life & Health Insurance Co.* v. *Turner*, *g.v.r.*, 59 U.S.L.W. 3733, 3741 (U.S. Apr. 29, 1991) (No. 90-1399); *Intercontinental Life Insurance Co.* v. *Lindblom*, *g.v.r.*, 59 U.S.L.W. 3693, 3701 (U.S. Apr. 15, 1991) (No. 90-1284).

[3] This assertion is, of course, literally untrue. As Alabama Power points out in the Petition, at 27 & n.28, Alabama (similar to other neighboring jurisdictions) has established a monetary criminal punishment of $2,000 for negligent homicide. What Alabama has refused to do is to establish an analogous limit on monetary punishment that can be imposed by *civil* juries and courts for the negligent loss of life. Alabama Power's position is that Alabama is constitutionally compelled to do on the civil side what it (and every other State) has done on the criminal side. As Alabama Power points out, Pet. at 29, if Alabama desires to establish a system of higher fines for corporations which negligently cause the loss of a life that recognizes that corporations cannot be sentenced to prison, Alabama may do so.

ever, only dramatizes the unconstitutionality of the imposition of punitive damages for negligent, non-malicious conduct: although respondent seems to concede that punishment must be proportional to the wrongdoing at issue, Alabama's controls over punitive damage awards for mere negligence are in fact less stringent than those applied to cases involving intentional conduct. Thus, in Alabama and other jurisdictions which allow punitive damages for negligent conduct, punitive awards for negligence will, as in this case, very likely exceed by millions of dollars punitive awards for intentional, malicious conduct.

Respondent's attempt to evade the questions presented in the Petition through conclusory, glib assertions must fail; so must its efforts to recharacterize the undeniably punitive quality of the $3,500,000 award at issue and to displace the jury's determination, confirmed expressly by the Supreme Court of Alabama, that this case involves only negligent, non-malicious conduct. Respondent fabricates, out of whole cloth, the concept of "classic punitive damages" in an attempt to convince this Court that the damages awarded in this case constitute something other than what they obviously are: punitive damages. And in an effort to avoid the jury's unequivocal conclusion that Alabama Power's conduct was merely negligent, and not wanton, respondent further asserts that the jury verdict form means the exact opposite of what it states: thus, according to respondent, the check mark after the word "negligence" and the absence of any mark after the word "wantonness" indicates not that Alabama Power was only negligent, but that it was wanton. Alabama Power will address both of these untenable contentions in turn.

1. Respondent attempts, unsuccessfully, to distinguish this case from myriad cases decided over several centuries in which punitive damage awards for mere negligence were soundly repudiated by advancing the meaningless distinction that in those cases, unlike this case, compensatory damages were awarded in addition to punitive damages. Repeatedly characterizing the punitive awards in those cases as "classic punitive damages," *e.g.*, Opp., at 14-15, respondent relies on a hitherto unheard of classification that cannot be reconciled with this Court's precedent. *For constitutional purposes*, this Court has recognized only two types of civil damages, compensatory and punitive. *See United States* v. *Halper*, 490 U.S. 435, 447-48 (1989). Under *Halper*, any damages that are not compensatory are, by definition, punitive for purposes of analysis under the Constitution; there is no middle ground and there are no degrees of punitive damages. Respondent's assertion that damages awarded under Alabama's punitive damage system are somehow different from other punitive damages, therefore, is pure *ipse dixit*.

As respondent admits, the damages awarded in this case are not compensatory. Opp., at 13. The record in this case is devoid of any evidence to support a claim for compensatory damages; indeed, the Alabama courts have chosen to construe Alabama's wrongful death act in such a way as to preclude the admissibility of such evidence by making it legally irrelevant to the cause of action for wrongful death. Furthermore, the punitive damage instructions given to the jury in this case were identical to the instructions employed in *Pacific Mutual* which, as the respondent necessarily concedes, involved punitive, not compen-

satory, damages. Opp., at 21 n.28. Reflecting this state of affairs, the jury verdict form characterizes the award as "punitive damages." Pet., at 32a.

Respondent further attempts to distinguish the punitive award in this case from "classic punitive damages" by contending that punitive damage awards under Alabama's wrongful death statute are remedial, not penal, in nature. Opp., at 10. The Supreme Court of Alabama, however, has unequivocally held that damages awarded under that statute are penal in nature. *Black Belt Wood Co.* v. *Sessions*, 514 So. 2d 1249, 1262 (Ala. 1987). Even if Alabama courts may have been somewhat inconsistent in the *label* that has been applied to these damages, it is beyond peradventure that the *substance* of these damages is punitive, not compensatory, and that the characterization of the damages as a matter of state law is in any event irrelevant to the constitutional point. *See Halper*, 490 U.S., at 447-48.[4]

---

[4] Respondent further attempts to distinguish the punitive award in this case by arguing that this Court, in *Louis Pizitz Dry Goods Co.* v. *Yeldell*, 274 U.S. 112 (1927), upheld as constitutional punitive damage awards for mere negligence under Alabama's wrongful death statute. *See* Opp., at 9-10. Respondent argues that because this Court held in *Pizitz* that an employer could be liable for punitive damages on account of his employee's negligence, such liability could also be constitutionally applied to the employee. Opp., at 10. This argument, however, finds no support in the Court's decision in *Pizitz*. As discussed in the Petition, at 28 n.20, this Court in *Pizitz* assumed, without addressing the issue, that the employee himself could have been liable for punitive damages for his negligent conduct; accordingly, the Court limited its analysis to the constitutionality of imposing such liability on a *respondeat superior* basis. This case, therefore, tests the Court's uncritical, unlitigated and therefore

2. Respondent also contends that the jury found that Alabama Power had been more than merely negligent. Opp., at 5. The absurdity of this contention is obvious: the verdict form unequivocally indicates that the jury found that Alabama Power had acted negligently and not wantonly, a conclusion which the Supreme Court of Alabama expressly adopted, *see* Pet., at 1a. Respondent speculates that the only reason the jury did not find Alabama Power liable for wanton conduct was that the jury could have rejected

---

undecided assumption that a negligent tortfeasor may be liable for punitive damages notwithstanding centuries of Anglo-American jurisprudence to the contrary.

Respondent erroneously contends that this Court declined to reconsider its decision in *Pizitz* on four occasions. Opp., at 12. In one of those cases, however, the Court dismissed the appeal for lack of jurisdiction, a reason entirely unrelated to the decision in *Pizitz*. *See Alabama Power Co.* v. *Capps*, 519 So. 2d 1328 (Ala.), *appeal dismissed*, 486 U.S. 1002 (1988) (federal question not properly presented). In another case, *Alabama Power Co.* v. *Cantrell*, 507 So. 2d 1295 (Ala. 1987), *appeal dismissed*, 486 U.S. 1028 (1988), the only question presented by the appellant was the constitutionality of Alabama's appeal penalty statute, the constitutionality of which was upheld in *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71 (1988), thus resulting in the dismissal of Alabama Power's appeal for want of a substantial federal question. *Clardy* v. *Sanders*, 551 So. 2d 1057 (Ala.), *cert. denied*, 110 S. Ct. 376 (1989), involved wanton misconduct, so the Court's punitive damage holding in *Pizitz* was not implicated. In *Burlington Northern R. Co.* v. *Whitt*, No. CV-85-311 (Ala. Dec. 21, 1988), *cert. denied*, 59 U.S.L.W. 3665, 3672 (U.S. Apr. 1, 1991) (No. 90-1250), a case Alabama Power has previously addressed, *see* Pet., at 4-5, the jury was not asked to determine whether the defendant had acted wantonly or merely negligently and the Supreme Court of Alabama expressly found that the record contained substantial evidence of wantonness.

Alabama Power's contributory negligence claim. Opp., at 5.[5] The jury verdict form speaks for itself—only negligence, not wantonness, was checked; so also does the Supreme Court of Alabama's conclusion that the "jury found Alabama Power guilty of negligence," Pet., at 1a. This unambiguous record provides no basis for probing the jury's mind or otherwise avoiding the sharply presented questions Alabama Power brings to this Court for review. A system of civil "justice" that permits the imposition of virtually unlimited punishment based upon the unfettered discretion of juries and judges is, quite literally, "the image of a system of justice that has lost its ancient sense of priority, a system that few Americans would recognize as our own." *County of Riverside* v. *McLaughlin*, No. 89-1817 (U.S. May 13, 1991) (Scalia, J., dissenting), slip op., at 13.

---

[5] Respondent also attempts to reargue the facts of this case, alleging that Alabama Power's conduct constituted more than mere negligence and, in effect, asking this Court to set aside the critical findings of fact by the Supreme Court of Alabama in its opinion in this case. Opp., at 2-4. This Court, however, has no authority to redetermine facts found by the jury and confirmed by the highest court of a state. *See Atlantic & Gulf Stevedores, Inc.* v. *Elderman Lines, Ltd.*, 369 U.S. 355, 358-59 (1962) (Supreme Court cannot "redetermine facts found by the jury").

CONCLUSION

Certiorari should be granted and the important questions presented should be set for plenary consideration.

May 15, 1991

Respectfully submitted,

Of Counsel:

STERLING G. CULPEPPER, JR.
M. ROLAND NACHMAN, JR.
DAVID R. BOYD
WILLIAM P. COBB, II
BALCH & BINGHAM
Post Office Box 78
Montgomery, Alabama 36101
(205) 834-6500

JOSEPH AVANZATO
JEFFREY T. GILLERAN
GIBSON, DUNN & CRUTCHER
1050 Connecticut Ave., N.W.
Washington, D.C. 20036-5303

THEODORE B. OLSON
*LARRY L. SIMMS
GIBSON, DUNN & CRUTCHER
1050 Connecticut Ave., N.W.
Washington, D.C. 20036-5303
(202) 955-8500

Attorneys for Petitioner

**Counsel of Record*